

**DEPARTMENT OF STATE REVENUE****LETTER OF FINDINGS NUMBER: 99-0598****Income Tax  
For Tax Years 1995-1997**

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**ISSUE****I. Adjusted Gross Income Tax—Unitary Status**

**Authority:** IC 6-3-2-2

Taxpayer protests the Department's determination that it was not eligible to file a combined return with affiliated companies.

**STATEMENT OF FACTS**

Taxpayer operates several movie theaters in Indiana and other states. The Indiana Department of Revenue ("Department") determined that taxpayer was not eligible to file a combined return with several affiliated companies. The Department issued proposed assessments for taxpayer as a single filer. Taxpayer protests this determination. Further facts will be supplied as required.

**I. Adjusted Gross Income Tax—Unitary Status**

Taxpayer protests the adjustment disallowing the filing of a combined return and assessing taxpayer as a single filer. Taxpayer states that it received permission to include a total of eleven companies from the Department in a Revenue Ruling. The Revenue Ruling explained that, based on the information available at the time, permission was granted to file a combined return. The Revenue Ruling also stated that the permission was conditional on the accuracy of the facts and that, if it was determined that the stated facts were inaccurate, permission could be revoked.

As the result of an audit, the Department determined that the facts did not warrant filing a combined return. Most significantly, the Department determined that nine of the eleven corporations included in the combined return had no nexus with Indiana. Also, the nine non-nexus corporations all had losses for the years in question, while the two nexus corporations had positive income for those years. By including the nine non-nexus corporations and including losses which occurred outside Indiana, taxpayer was able to offset the income it made in Indiana. The Department adjusted taxpayer's return to reflect filing as a single filer.

Taxpayer protests this adjustment and states that it meets all unitary criteria and is therefore a unitary group according to IC 6-3-2-2. The Department notes that IC 6-3-2-2 does not provide a definition of a unitary group, however the relevant subsection is IC 6-3-2-2(q), which states:

Notwithstanding subsections (o) and (p), one (1) or more taxpayers may petition the department under subsection (l) for permission to file a combined income tax return for a taxable year. The petition to file a combined income return must be completed and filed with the department not more than thirty (30) days after the end of the taxpayer's taxable year.

Therefore, IC 6-3-2-2(q) relies on IC 6-3-2-2(l), which states:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one (1) or more of the factors;
- (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Reading these two subsections together, a taxpayer may petition the Department to file a combined return if the apportionment provisions of IC 6-3-2-2 do not fairly represent a taxpayer's income derived from sources within the state of Indiana. The use of the phrase "may petition" in IC 6-3-2-2(l) means that the Department is not compelled to use the alternative methods provided. The Department notes that it would not fairly represent taxpayer's income derived from sources within the state of Indiana if taxpayer were to include companies which have no nexus to Indiana, no Indiana taxable income and non-Indiana related losses. The inclusion of these companies serves no other purpose than to dilute Indiana income earned by the two Indiana-nexus companies. This would not fairly represent taxpayer's income derived from sources within the state of Indiana, therefore use of any of the alternative methods provided in IC 6-3-2-2(l) is not reasonable.

Taxpayer also protests the wording in the audit report. Taxpayer refers to the auditor's listing of the non-nexus companies as, "...a movie theater...one owns a traffic signal...one operated a pizza restaurant..." and states that there is no requirement that a taxpayer own or operate more than one business venture in order to be included on a combined return. The Department notes that the auditor worded the report in this manner in order to clarify and establish that the businesses had no Indiana operations and therefore no Indiana nexus. The wording was clearly not intended to place a multiple operation requirement on the taxpayer.

Next, taxpayer complains that it should be allowed to file a combined return including the two companies which do have Indiana nexus. Taxpayer states that to force it to file individually distorts Indiana income to the detriment of the two companies. The Department points out that taxpayer had the opportunity to submit an accurate petition to file a combined return. Instead, taxpayer opted to submit a petition that included nine out of eleven companies which, had the Department known all of the relevant facts at the time of the petition, would not be allowed on a combined return. IC 6-3-2-2(q) plainly states, "The petition to file a combined income return must be completed and filed with the department not more than thirty (30) days after the end of the taxpayer's taxable year." Taxpayer did not complete and file a petition to file a combined return including the two companies with Indiana nexus within thirty days after the end of the taxpayer's taxable year, therefore taxpayer does not qualify under IC 6-3-2-2(q).

In conclusion, the Department properly determined that taxpayer did not qualify to file a combined return. Nine out of the eleven companies had no Indiana nexus at all. IC 6-3-2-2(l) and IC 6-3-2-2(q) provide the reasons and methods for petitioning to use alternative methods of calculating Indiana adjusted gross income tax. Taxpayer does not qualify for and did not properly petition to use such methods.

### **FINDING**

Taxpayer's protest is denied.

WL/JM 05/28/11